Supreme Court, U.S.
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In the
Supreme Court of the United States

GEORGE FLUELLEN,

Petitioner,

vs.

HANS G. WALKER, Superintendent,
Auburn, C.F.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUPPLEMENTAL APPENDIX

MARVIN B. SEGAL
Counsel of Record
59 Maiden Lane
New York, New York 10038
(212) 972-1000

JOHN W. MITCHELL
Counsel of Record
600 Third Avenue
New York, New York 10016
(212) 696-9500

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEORGE FLUELLEN,

Petitioner,

-against-

HANS G. WALKER,
Superintendent,

Respondent.

97 Civ. 3189 (KMW)(AJP)

REPORT AND RECOMMENDATION

ANDREW J. PECK, United States Magistrate Judge:

To the Honorable Kimba M. Wood, United States District Judge:

Pro se petitioner George Fluellen seeks a writ of habeas corpus from his conviction of conspiracy, murder, burglary and criminal possession of a weapon, alleging: (1) that the trial court's reasonable doubt charge was erroneous (Pet. ¶ 12(A)); and (2) ineffective assistance of appellate counsel for failing to argue that trial counsel was ineffective for not objecting to the reasonable doubt charge (Pet. ¶ 12(B)).

For the reasons set forth below, Fluellen's petition should be denied.

FACTS

On March 1, 1989, petitioner George Fluellen was indicted for conspiracy to distribute heroin, intentional and felony murder, burglary and criminal weapons possession. (Ex. 1:[1] Indictment; Ex. 3: Fluellen 1st Dep't Br. at 2.) Specifically, the indictment charged that beginning in August 1987, Fluellen and others conspired to package and distribute heroin with the brand name "Top Gun" in East Harlem, that Fluellen controlled and directed the East Harlem operation as part of a larger drug enterprise, and that on the afternoon of August 15, 1988, Fluellen strangled and shot Valentino Plaza-Colon in the head. (Ex. 1: Indictment; *see also* Affidavit of ADA Donald Siewert, dated 11/17/97, ¶¶ 5-7.)

On November 14, 1989, the jury trial of Fluellen and two codefendants began in New York State Supreme Court, New York County. (Siewert Aff. ¶ 8.) "In a two-month trial which produced a record approaching 6500 pages, the jurors heard sixty-nine witnesses and examined more than 200 exhibits." (*Id.*)

The Trial Court's Jury Instructions Regarding Burden of Proof and Reasonable Doubt

At the beginning of jury selection, the court told the potential jurors that, if selected, they would be called upon to decide whether the evidence at trial "establishes the guilt of the defendants beyond a reasonable doubt." (Ex. 8: Preliminary Instructions to the Venire at 79-81.) The court further told the venire members that Fluellen and his co-defendants "are presumed to be innocent and that presumption of innocence remains with them throughout the trial unless and until their guilt has been established to your satisfaction, only to your satisfaction, you the jury, beyond a reasonable doubt." (*Id.* at 98.) The trial judge also made clear that "the burden of removing that cloak of innocence, the burden of proving the

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[1] References to exhibits are to the exhibits in the State's Appendices.

defendants' guilt beyond a reasonable doubt remains with the prosecution" and "[n]o defendant is ever required to prove his or her innocence." (*Id.* at 99.)

The court restated these principles in preliminary instructions at the beginning of trial when it reminded the jurors that it was their job to make "the ultimate decision" of "whether the prosecution has proven guilt beyond a reasonable doubt" (Ex. 9: Preliminary Instructions to the Petit Jury at 236) and that "the burden of proof is with the prosecution" and "[t]he defense is not required to prove anything" (*id.* at 222; *see also id.* at 226).

In its final jury charge at the conclusion of trial, the court began by reminding the jurors, as he had instructed them at the beginning of the trial, that Fluellen and his co-defendants were "each presumed to be innocent" and that "that presumption remains with each of them throughout the trial unless and until that person's guilt has been established beyond a reasonable doubt." (Ex. 10: Charge at 6345.) The judge further instructed:

> Indeed, the presumption of innocence exists now at this very moment. It will continue to exist throughout my charge to you. And *you carry that presumption of innocence with you into the juryroom. The only way that the presumption of innocence can be destroyed is by all of you agreeing on the basis of the evidence that the defendant is guilty beyond a reasonable doubt*. Then at that point in time if and when you reach that decision then the presumption is over.
>
> You must start by saying that the defendant is presumed innocent. And only if the evidence which you accept and you believe convinces you beyond a reasonable doubt that the presumption must be discarded and a verdict of guilty returned, only then is the presumption destroyed.

> *The burden of overcoming that presumption of innocence, that shroud of innocence remains upon the prosecution throughout the trial. And it never shifts to the defense. The defendant is never required to prove his innocence.* And each and every element of the crimes that will be submitted to you as I will define those elements must be proven by the prosecution beyond a reasonable doubt.
>
> If you find that the People's burden is fulfilled, then and only then must you find the defendant guilty of the charges. If the People fail in their burden you must acquit the defendant and find him not guilty.

(*Id.* at 6345-46, emphasis added.)

In explaining reasonable doubt to the jury, the trial court defined a reasonable doubt as a doubt for which "you are able to give a reason or a rationale [sic] explanation which is based upon your evaluation of the evidence or lack of evidence in the case." (*Id.* at 6347.) The judge went on to postulate a discussion in which one deliberating juror challenged another to state a reason for his or her doubt:

> *Now let's assume that you are sitting around the jury-room and let's assume a particular juror says I have a doubt.* Then in other words, let's say that Ms. Ortiz can turn to that juror and say well, what is that a doubt about. And that juror would be expected to say, I have a doubt as to this defendant's guilt or this defendant's guilt or this defendant's guilt. *And she can then say well, what is the reason for your doubt.* And *that juror would have to articulate, give a reason or a rationale [sic] explanation by pointing to items of evidence in the case or lack of evidence in the case.*

> All right, so the person could say Mr. Corralo could say, I have a doubt because of this in the evidence or that in the evidence. Or I believe the evidence does not satisfy this or that with respect to the case. All right so that would be a reasonable doubt.
>
> Therefore jurors, it follows that if one doubt is [sic] that a defendant is guilty merely because of some hunch or a whim or speculation or a superstitious notion, then such a doubt is not a reasonable doubt since it is not based on the evidence or lack of evidence in the case. Nor is that kind of a doubt a rationale [sic] doubt.
>
> If one doubts that a defendant is guilty merely because of sympathy for him or because of a desire to avoid what might very well appear to be a very disagreeable task, then that type of doubt is not a reasonable doubt because it is not based on the evidence or lack of evidence in the case.

(*Id.* at 6347-49, emphasis added.)

The court further explained that:

> [I]f you the jury determine that there exists a doubt as to the guilt of the defendant which arises because of the evidence or lack of evidence in the case or insufficiency of evidence and for which you can give a reasonable doubt, reason or a rationale [sic] explanation; then such a doubt is a reasonable doubt. And because the People have not proven guilt you must find the defendant not guilty.

(*Id.* at 6350.) Defense counsel did not object to the court's reasonable doubt charge. (*See id.* at 6473-83.) The court went on to charge the jury as to the elements of each crime with which Fluellen and his co-defendants were charged, reminding the jurors that the prosecution was required to prove

beyond a reasonable doubt the defendants' identity, their accomplice liability, and each element of every offense. (*Id.* at 6365-468.)

Verdict and Sentence

The jury found Fluellen guilty as charged and Fluellen was sentenced to concurrent terms of 8 to 24 years on the conspiracy counts, to be served consecutively to 22 years to life imprisonment on the murder counts. (Ex. 3: Fluellen First Dep't Br. at 46-48.) *See People* v. *Fluellen*, 194 A.D.2d 486, 486, 599 N.Y.S.2d 574, 575 (1st Dept 1993).

Direct State Appeal

Fluellen appealed to the First Department and was assigned counsel. (*See* Siewert Aff. ¶ 10; Ex. 3: Fluellen 1st Dept Br. at 68.) In a sixty-eight page brief, Fluellen's attorney argued that: (1) the trial court should have granted Fluellen a mistrial after the prosecutor elicited testimony from a prosecution witness suggesting that Fluellen's relative had tried to intimidate the witness while the witness testified at trial (Ex. 3: Fluellen 1st Dep't Br. at 49-56); (2) Fluellen's guilt was not proved beyond a reasonable doubt, in particular because the prosecution had relied on insufficiently corroborated accomplice witnesses and because virtually all of the prosecution's witnesses had received "money and other inducements" from the prosecutor (*Id.* at 57-62); and (3) Fluellen's consecutive sentences were illegal and his overall sentence was excessive (*id.* at 63-67).

In a twenty-one page supplemental pro se brief, Fluellen argued that the trial judge: had improperly admitted racially inflammatory evidence against him (Ex. 4: Fluellen Supp. Pro Se 1st Dep't Br. at 2-8), unfairly marshaled the evidence (*id.* at 9-15), and improperly instructed the jury on reasonable doubt (*id.* at 16-20).

On June 29, 1993, the First Department affirmed Fluellen's conviction. *People* v. *Fluellen*, 194 A.D.2d 486, 599 N.Y.S.2d 574 (1st Dep't 1993). The First Department held that: the prosecution had "overwhelmingly" established Fluellen's guilt, that the trial court had properly denied Fluellen a mistrial based on the witness-intimidation claim, and that Fluellen's sentence was proper. *Id.* at 486, 599 N.Y.S.2d at 575. The First Department also stated that it had reviewed Fluellen's other arguments, "including those raised in the supplemental pro se brief," and found "them to be either unpreserved or without merit." *Id.* at 486-87, 599 N.Y.S.2d at 575.

Fluellen's counsel applied for leave to appeal to the New York Court of Appeals. In a supplemental pro se application, Fluellen drew the Court of Appeals' attention to the issues raised in his supplemental pro se brief to the First Department including his argument challenging the trial court's reasonable doubt instructions. (Ex. 5: Fluellen Supp. Pro Se Leave to Appeal Letter.) The New York Court of Appeals denied leave to appeal on December 15, 1993, and again on March 7, 1994. *People* v. *Fluellen*, 82 N.Y.2d 894, 610 N.Y.S.2d 161 (1993), & 83 N.Y.2d 852, 612 N.Y.S.2d 384 (1994).

State Collateral Proceedings

On July 9, 1991, Fluellen moved to vacate his conviction pursuant to CPL § 440.10 based on newly discovered evidence as to money allegedly given by the State to a prosecution witness. (Ex. 6: Fluellen CPL § 440.10 Motion Papers.) On May 27, 1992, the trial court denied Fluellen's CPL § 440.10 motion. (Ex. 6: 5/27/92 Opinion.) On September 17, 1992, the First Department denied leave to appeal. (Ex. 6: Certificate Denying Leave.)

On April 9, 1997, Fluellen moved the First Department for a writ of error coram nobis, alleging that he had been denied effective assistance of appellate counsel. (Ex. 7: Fluellen

Coram Nobis Papers.) Fluellen asserted that his appellate attorney had improperly failed to argue that trial counsel had provided ineffective assistance. trial. (Ex. 7: Fluellen Coram Nobis Aff. ¶¶ 12-28.) Fluellen contended that portions of the trial court's reasonable doubt charge would have constituted reversible error had his attorney objected to them, and that appellate counsel should have argued that trial counsel was ineffective in failing to so object. (*Id.* ¶¶ 19-22, 27-28.)

On August 7, 1997, the First Department denied Fluellen's coram nobis motion. *People* v. *Fluellen*, 242 A.D.2d 408, 661 N.Y.S.2d 689 (1st Dep't 1997). (*See also* Ex. 7, last page: 8/7/97 1st Dep't Order.)

Fluellen's Federal Habeas Petition

Fluellen's present federal habeas petition is dated April 14, 1997 and was received by the Court's Pro Se Office on April 21, 1997. (Dkt. No. 1: Pet. at 2, 7.) The petition raises two habeas grounds: (1) the trial court's reasonable doubt jury instruction was erroneous (Pet. ¶ 12(A)); and (2) ineffective assistance of appellate counsel for failing to argue that trial counsel was ineffective for not objecting to the reasonable doubt charge. (Pet. ¶ 12(B)).

On May 21, 1997 and June 11, 1997, before the First Department had ruled on Fluellen's ineffective assistance of appellate counsel motion, this Court issued a Report and Recommendation to dismiss Fluellen's petition as a "mixed" petition containing both exhausted and unexhausted claims (Dkt. Nos. 3, 5); Judge Wood affirmed on that ground on September 7, 1997 (Dkt. No. 8). *See Fluellen* v. *Walker*, 975 F. Supp. 565 (S.D.N.Y. 1997) (Wood, D.J. & Peck, M.J.).

On October 3, 1997, after Fluellen notified the Court that the First Department had denied his coram nobis petition, Judge Wood allowed Fluellen to resubmit his habeas petition. (Dkt. No. 9: 10/3/97 Order.) On November 17, 1997, the State moved to dismiss the petition as untimely under the Second

Circuit's *Peterson* v. *Demskie*, 107 F.3d 92 (2d Cir. 1997), interpretation of the statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). (Dkt. Nos. 12-13.) Judge Wood denied the motion on March 2, 1999 based on the Second Circuit's decision in *Ross* v. *Artuz*, 150 F.3d 97 (2d Cir. 1998). (Dkt. No. 16: 2/26/99 Order.)

The State answered the Petition on April 2, 1999. (Dkt. Nos. 17-18.) On February 22, 2000, Judge Wood referred Fluellen's petition to me for a Report and Recommendation. (Dkt. No. 22.)

ANALYSIS

I. THE TRIAL COURT'S REASONABLE DOUBT JURY INSTRUCTION WAS PROPER

Fluellen argues that the trial court erred in delivering a reasonable doubt charge which included instructions to the jurors that, if called upon by their fellow jurors to explain their doubts as to Fluellen and his co-defendants' guilt, they "would have to articulate, give a reason or rationale [sic] explanation by pointing to items of evidence in the case or lack of evidence in the case." (Pet. ¶ 12(A); *see also* Fluellen Br. at 1-29.)

A. The Court Cannot Say That The First Department's Decision Rests On An Independent State Ground of Procedural Default

Fluellen raised the jury instruction claim in his supplemental pro se brief to the First Department (Ex. 4: Fluellen Supp. Pro Se 1st Dep't Br. at 16-20.) In response, the State argued both that the claim was unpreserved because defense counsel had not objected to the instruction and that the instruction was proper. (Ex. 2: State 1st Dept Br. at 74-77.) The First Department, after specifically addressing other claims, stated that "[w]e have reviewed defendant's additional arguments including those raised in the supplemental pro se brief

and find them to be either unpreserved or without merit." *People* v. *Fluellen*, 194 A.D.2d 486, 486, 599 N.Y.S.2d 574, 575 (1st Dep't 1993). The State now argues that "[t]he natural inference from this summary dismissal of an unpreserved claim is that the Appellate Division rejected [Fluellen's jury instruction claim] on state procedural grounds, barring the claim from habeas corpus review." (State Br. at 7 n.*.)

It is well-established that "[w[hen a state appellate court affirms a conviction with an opinion, [a federal court] cannot assume that the decision rested on a procedural default. Indeed, in order to preclude federal review, the last state court to render judgment must clearly and expressly state[ ] that its judgment rest[ed] on a state procedural bar.'" *Jones* v. *Vacco*, 126 F.3d 408, 415 (2d Cir. 1997) (citations omitted); *accord*, *Estrada* v. *Senkowski*, 98 Civ. 7796, 1999 WL 1051107 at *10 (S.D.N.Y. Nov. 19, 1999) (Pauley, D.J. & Peck, M.J.); *see also*, *e.g.*, *Avincola* v. *Stinson*, 97 Civ. 1132, 1999 WL 557965 at *17 n. 7 (S.D.N.Y. July 9, 1999) (Scheindlin, D.J. & Peck, M.J.). The First Department's decision here can only be described as "facially ambiguous." *Hayes* v. *Coombe*, 142 F.3d 517, 519 (2d Cir. 1998), *cert. denied*, 525 U.S. 1108, 119 S. Ct. 879 (1999); *accord*, *Estrada* v. *Senkowski*, 1999 WL 1051107 at *10; *see also*, *e.g.*, *Avincola* v. *Stinson*, 1999 WL 557965 at *17 n. 7. Accordingly, since "[i]t is unclear whether the [First Department] rejected [Fluellen's jury instruction] claim because it was unpreserved or because it was deemed meritless as a matter of federal constitutional law," this Court will address the merits of the claim. *Tankleff* v. *Senkowski*, 135 F.3d 235, 247 (2d Cir. 1998); *accord*, *e.g.*, *Estrada* v. *Senkowski*, 1999 WL 1051107 at *10; *Avincola* v. *Stinson*, 1999 WL 557965 at *17 n. 7; *McLean* v. *McGinnis*, 29 F. Supp. 2d 83, 92 (E.D.N.Y. 1998).

B. Fluellen's Jury Instruction Claim Lacks Merit

Over 25 years ago, in 1973, the Supreme Court noted that it was already a "well established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp* v. *Naughten*, 414 U.S. 141, 146-47, 94 S. Ct. 396, 400 (1973); *accord, e.g., Gaines* v. *Kelly*, 202 F.3d 598, 605-10 (2d Cir. 2000); *Lugo* v. *Kuhlmann*, 68 F. Supp. 2d 347, 365 (S.D.N.Y. 1999) (Patterson, D.J. & Peck, M.J.); *Mason* v. *Shriver*, 14 F. Supp. 2d 321, 330 (S.D.N.Y. 1998) (Preska, D.J. & Peck, M.J.); *see also, e.g., Cage* v. *Louisiana*, 498 U.S. 39, 41, 111 S. Ct. 328, 329 (1990) ("In construing the instruction, we consider how reasonable jurors could have understood the charge as a whole."); *United States* v. *Park*, 421 U.S. 658, 674, 95 S. Ct. 1903, 1912 (1975) (quoting *Cupp*).

In *Victor* v. *Nebraska*, 511 U.S. 1, 114 S. Ct. 1239 (1994), the Supreme Court noted that the beyond a reasonable doubt standard "is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." *Id.* at 6, 114 S. Ct. at 1243. Since "the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof," the instructions must "correctly conve[y] the concept of reasonable doubt" when "taken as a whole." *Id.*; *accord, e.g. Gaines* v. *Kelly*, 202 F.3d at 605; *Lugo* v. *Kuhlmann*, 68 F. Supp. 2d at 365.

Fluellen challenges the trial court's instruction that, if questioned by a fellow juror as to the reason for his or her doubt, "that juror would have to articulate, give a reason or a rationale [sic] explanation by pointing to items of evidence in the case or lack of evidence in the case." (Ex: 10: Charge at 6347-48.) Fluellen argues that "in charging reasonable

doubt in this manner, [the trial court] less[ened] the People's burden of proof and shifted the burden of proof to the defendant." (Fluellen Br. at 4.)

The Second Circuit has held that a jury instruction that states or implies that jurors should be able to give a reason for their doubts "is 'not approved' and 'perhaps unwise,' but is 'not erroneous.'" *United States* v. *Davis*, 328 F.2d 864, 868 (2d Cir. 1964) (Friendly, C.J.); *accord, e.g.*, *Chalmers* v. *Mitchell*, 73 F.3d 1262, 1268 (2d Cir.), *cert. denied*, 519 U.S. 834, 117 S. Ct. 106 (1996); *see also, e.g.*, *Pinto* v. *Stinson*, No. 96-2655, 129 F.3d 114 (table), 1997 WL 664866 at *1 (2d Cir. Oct. 21, 1997) ("While this Court has disapproved of [reasonable doubt jury instructions including the phrase a doubt for which you can give a substantial reason] it has not found such instructions to violate due process. . . . Likewise, the jury instructions given here, while problematic, did not unconstitutionally lower the State's burden of proof."), *cert. denied*, 522 U.S. 1131, 118 S. Ct. 1085 (1998); *Beverly* v. *Walker*, 118 F.3d 900, 903 (2d Cir. 1997), *cert. denied*, 522 U.S. 883, 118 S. Ct. 211 (1997); *Lugo* v. *Kuhlmann*, 68 F. Supp. 2d at 365-66; *Mason* v. *Schriver*, 14 F. Supp. 2d at 330. Indeed, New York State Courts have long approved of such language. *See, e.g., Vargas* v. *Keane*, 86 F.3d 1273, 1277 (2d Cir.), *cert. denied*, 519 U.S. 895, 117 S. Ct. 240 (1996); *Lugo* v. *Kuhlmann*, 68 F. Supp. 2d at 366 & n.12 (citing cases); *Mason* v. *Schriver*, 14 F. Supp. 2d at 330-31 n.7 (citing cases); *see also* cases cited at page 24 below.

In analyzing an allegedly erroneous reasonable doubt jury charge, the Second Circuit has emphasized that a court must view the instruction in light of the charge as a whole to determine whether there has been a constitutional violation. *See, e.g.*, *Gaines* v. *Kelly*, 202 F.3d at 605-06; *Pinto* v. *Stinson*, 1997 WL 664866 at *1; *Beverly* v. *Walker*, 118 F.3d at 903-04 (upholding reasonable doubt instruction as a doubt that a juror is able to communicate if asked by a fellow juror,

in context of entire charge); *Vargas* v. *Keane*, 86 F.3d at 1277-78 (upholding jury instruction that defined reasonable doubt as "doubt for which you can give a reason," when viewed in light of the charge as a whole); *Chalmers* v. *Mitchell*, 73 F.3d at 1268; *Lugo* v. *Kuhlmann*, 68 F. Supp. 2d at 366 (upholding similar charge); *Barber* v. *Scully*, 557 F. Supp. at 1296 (upholding similar charge); *Mason* v. *Shriver*, 14 F. Supp. 2d 321, 330-31. "[W]here the jury instructions taken as a whole clearly instruct that the burden is on the government and that the defendant is never required to prove his innocence, the charge as a whole will not be held to be erroneous." *Mason* v. *Schriver*, 14 F. Supp. 2d at 330 (citing *Vargas, Chalmers & Davis)*; *accord*, *Lugo* v. *Kuhlmann*, 68 F. Supp. at 366. The question is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution;" that is, "whether 'there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the [In re] *Winship* standard'" of "'proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged.'" *Gaines* v. *Kelly*, 202 F.3d at 602, 605, 606 (quoting Supreme Court opinions).

Here, the trial court's entire charge made clear that Fluellen was not required to prove his innocence and that the burden rested on the State. For example, the trial judge instructed the jurors that Fluellen and his co-defendants were "each presumed to be innocent" and that "that presumption remains with each of them throughout the trial unless and until that person's guilt has been established beyond a reasonable doubt." (Ex. 10: Charge at 6345.) The court further stated that "[t]he burden of overcoming that presumption of innocence . . . remains upon the prosecution throughout the trial," that that burden "never shifts to the defense," and that "[t]he defendant is not required to prove his innocence." (*Id.* at 6346.) These instructions were in addition to instructions both at the

beginning of jury selection, at the very beginning of trial and throughout the final jury charge which made clear that the prosecution bore the burden of proof. (*See, e.g.*, Ex. 8 at 98, 99; Ex. 9 at 222; Ex. 10 at 6367-68, 6396, 6402-03, 6418-19, 6420-21, 6430-34, 6435-39, 6441-58.)

In addition, immediately preceding the disputed language, the court defined a reasonable doubt as a doubt "based upon your evaluation of the evidence or lack of evidence in the case." (Ex. 10: Charge at 6347.) Immediately after the challenged language, the trial judge told the jury that, to be reasonable, a doubt must not be based on "some hunch or a whim or speculation or a superstitious notion." (*Id.* at 6348.) Thus, the instruction in its entirety fairly conveyed that "any doubt sufficient for acquittal must be based on a reasoned evaluation of the evidence or lack of evidence, rather than on speculation, emotion or whim." *Vargas* v. *Keane*, 86 F.3d at 1278.

Fluellen points out that in *Vargas* v. *Keane*, the Second Circuit, in rejecting the petitioner's constitutional challenge to jury instructions defining a reasonable doubt as a "doubt for which you can give a reason if called upon to do so by a fellow juror in the jury room," remarked that "[t]he challenged language does not suggest . . . that a juror will be called upon to articulate his doubts, or that he must articulate them if so called upon" *Vargas* v. *Keane*, 86 F.3d at 1278 (*See* Fluellen Br. at 19.) This observation, however, was not central to the *Vargas* court's holding. Rather, the Second Circuit explained in *Gaines* the two considerations that had led it to uphold the jury charge in *Vargas*:

> First, we found that the surrounding passages in the instruction directed the jury to ground their decisions in the evidence, such that the "reason" a juror would think herself expected to give would simply be a reason based in the evidence, and not one exceeding degree of doubt required for acquittal. . . . Second, we reasoned that the

> surrounding passages sufficiently emphasized the prosecution's burden of proof, such that the jurors were unlikely to understand the instruction as demanding that they look to each other or to the defendant to supply a reason to acquit.

Gaines v. *Kelly*, 202 F.3d at 609. This Court agrees with the State that "a charge that jurors have to give reasons for their doubts differs only slightly from a charge that jurors *must be able to give reasons* 'if called upon to do so by a fellow juror in the jury room' " and that "[t]he former charge carries no greater potential for minimizing the reasonable doubt standard or shifting the burden of proof." (State Br. at 13-14, emphasis in original.) Indeed, in *Mason* v. *Schriver*, this Court upheld a reasonable doubt charge that also involved a hypothetical discussion of one juror asking another for the reasons for the juror's doubt. *Mason* v. *Schriver*, 14 F. Supp. 2d at 330-31.[2]

Fluellen also draws the Court's attention to *People* v. *Antommarchi*, 80 N.Y.2d 247, 590 N.Y.S.2d 33 (1992), decided nearly three years after Fluellen's trial. (Fluellen Br. at 6-7.) There, the New York Court of Appeals upheld a charge defining reasonable doubt as "a doubt for which a juror can give a reason if he or she is called upon to do so in the jury

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[2] The charge in *Mason* included the following language:

> "*If when you retire to deliberate*, and you discuss this case, and discuss it you should, for the process of reaching a verdict involves discussion and the give and take of your recollections and opinions of the evidence, and *one of you says, I have a doubt about this aspect of the case and a fellow juror responds what is the reason for your doubt? If you can then give a reason based on the evidence or lack of evidence, that is a reasonable doubt.* If you can't, it is not a reasonable doubt."

Id. at 330 (emphasis added).

room" but held that the following instructions, given as part of an *Allen* charge,[3] "violated the Due Process Clauses of both the State and Federal Constitutions":

> You swore that, if you have a reasonable doubt, I repeat, a reasonable doubt, on any relative point or material element or on the evidence or lack of it, and when one or more of your fellow jurors questioned you about it, you would be willing and able to give him what you believe is a fair, calm explanation for your position based on the evidence or the lack of evidence in this particular case.

80 N.Y.2d at 251-52, 590 N.Y.S.2d at 35-36.

The *Antommarchi* court reasoned that "[t]he difference is between a charge which essentially defines the degree of clarity and coherence of thought necessary for the jurors to conclude they harbor a reasonable doubt and one which imposes an affirmative obligation on the juror to specifically articulate the basis for such doubt" *Id.* at 251, 590 N.Y.S.2d at 35-36. The New York Court of Appeals went on to explain as follows:

> [I]t is not surprising, nor improper, for a court to instruct the jury that a reasonable doubt is one for which a reason can be given, nor to augment that definition with an explanation that the doubt should be sufficiently clear so that the juror would be capable of giving a reason for his or her views. Indeed, it is difficult to envision how

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[3] "The term '*Allen* charge' is a generic term used for a type of supplemental instruction that is given to a deadlocked jury, first approved by the Supreme Court in *Allen* v. *United States*, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896). A traditional *Allen* charge reminds the jurors about the importance of obtaining a verdict and encourages jurors to listen 'to each other's arguments' while also emphasizing that 'the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows.'" *Smalls* v. *Batista*, 191 F.3d 272, 275 n.1 (2d Cir. 1999) (quoting *Allen*).

> jurors could follow the manifestly proper instructions of the court to listen to other jurors, give their views careful consideration, and reason together when considering the evidence if none of the individual jurors were able to express the reasons underlying their vote. Consequently, for over 100 years we have approved language defining a reasonable doubt as one which a juror could, if called upon to do so, express or articulate.
>
> The language used in the *Allen* charge, however, went beyond permissible bounds by placing on each juror the express duty of giving a 'fair, calm explanation for your position.' . . . An instruction that requires jurors to supply concrete reasons 'based upon the evidence' for their inclination to acquit implicitly imposes on defendants the burden of presenting a defense that supplies jurors with the arguments they need to legitimize their votes. As such, the charge actually reverses the constitutionally required principles that the defense bears no burden and that it is the prosecution that must introduce evidence sufficient to persuade the fact finder, beyond a reasonable doubt, of the defendant's guilt.

Id. at 252, 590 N.Y.S.2d at 36 (citations omitted).

Antommarchi is a state decision, not controlling as to federal constitutional questions, and, moreover, is distinguishable. Both because of its forceful language and the *Allen* charge context in which it was delivered, the instruction held to be reversible error in *Antommarchi* was far more likely than the instructions at Fluellen's trial to leave jurors with the impression that the defendant bore "the burden of presenting a defense that supplies the jurors with the arguments they need to legitimize their votes." In *Antommarchi*, the trial court admonished a deadlocked jury that its members were duty bound by oath to "be willing and able to give . . . a fair, calm explanation for [their] position[s]." 80 N.Y.S.2d at 251, 590 N.Y.S.2d at 35. In contrast, the judge at Fluellen's trial,

as part of a lengthy jury charge containing repeated reminders that the burden of proof remained at all times with the prosecution and never shifted to the defense, presented the jurors with a hypothetical scenario in which one juror asks another to explain the reason for his or her doubt, and instructed the jurors that, in such a situation, the challenged juror "would have to articulate, give a reason or rationale [sic] explanation by pointing to items of evidence in the case or lack of evidence in the case." (Ex. 10: Charge at 6347-48.) Taken in light of the entire jury instructions, the "challenged language [in Fluellen's charge] did not raise the quantum of doubt necessary for acquittal or shift the burden of proof away from the prosecution." *Vargas* v. *Keane*, 86 F.3d at 1277; *see also, e.g.*, *Lugo* v. *Kuhlmann*, 68 F. Supp. 2d at 366; *Mason* v. *Shriver*, 14 F. Supp.2d at 330-31. Accordingly, while this charge language is to be discouraged, the reasonable doubt charge here did not constitute constitutional error sufficient to justify habeas relief.

The Court's conclusion is further supported by the AEDPA's review standard, as explicated by the Supreme Court's recent decision in *Williams* v. *Taylor*, 120 S. Ct. 1495 (2000). Pursuant to the AEDPA,

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. § 2254(d)(1). The Supreme Court explained in *Williams* that:

> In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied — the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams v. *Taylor*, 120 S. Ct. at 1523.

Here, Supreme Court precedent "does not require that any particular form of words be used in advising the jury of the government's burden of proof," so long as the instructions "correctly conve[y] the concept of reasonable doubt" when "taken as a whole." *Victor* v. *Nebraska*, 511 U.S. at 5, 114 S. Ct. at 1243. The First Department's decision clearly is not "contrary to" Supreme Court precedent. While not as clear, this Court cannot say that the First Department's decision involved an unreasonable application of Supreme Court precedent: it is the Second Circuit, not the Supreme Court, that has criticized as "unwise" and "not approved" jury

instructions that jurors should be able to give a reason for their doubts. While the charge in Fluellen's case is close to the wrong side of the line under Second Circuit precedent (see page 12 above), Supreme Court precedent has not addressed this issue. Thus, even if this Court were to find the challenged jury instructions here to be erroneous (as opposed to merely unwise) — which it does not — the Court would not be able to grant habeas relief under the AEDPA because the First Department's decision is neither contrary to nor involves an unreasonable application of Supreme Court precedent.

II. FLUELLEN'S APPELLATE COUNSEL WAS NOT INEFFECTIVE

Fluellen argues that appellate counsel deprived him of effective assistance by failing to argue on appeal that Fluellen's trial attorney was ineffective. (Pet. ¶ 12(A); Fluellen Br. at 30-39.) According to Fluellen, the trial court's reasonable doubt jury charge would have constituted reversible error had trial counsel objected, and therefore appellate counsel should have argued that trial counsel was ineffective in failing to object. (*Id.*)

A. The *Strickland* v. *Washington* Standard

The Supreme Court has announced a two-part test to determine if counsel's assistance was ineffective. *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland* v. *Washington*, 466 U.S. at 687, 104 S. Ct. at 2064. This performance is to be judged by an objective standard of reasonableness. *Id.* at 688, 104 S. Ct. at 2064.

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Id. at 689, 104 S. Ct. at 2065.[4]

Second, the defendant must show prejudice from counsel's performance. *Strickland* v. *Washington*, 466 U.S. at 687, 104 S. Ct. at 2064. The "question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Id.* at 695, 104 S. Ct. at 2068-69. Put another way, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068.[5]

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[4] *Accord, e.g.*, *Dukes* v. *McGinnis*, 99 Civ. 9731, 2000 WL 382059 at *8 (S.D.N.Y. April 17, 2000) (Peck, M.J.); *Cruz* v. *Greiner*, 98 Civ. 7939, 1999 WL 1043861 at *16 (S.D.N.Y. Nov. 17, 1999) (Peck, M.J.); *Lugo* v. *Kuhlmann* , 68 F. Supp. 2d 347, 370 (S.D.N.Y. 1999) (Patterson, D.J. & Perk, M.J.); *Santos* v. *Greiner*, 99 Civ. 1545, 1999 WL 756473 at *7 (S.D.N.Y. Sept. 24, 1999) (Peck, M.J.); *Franza* v. *Stinson*, 58 F. Supp. 2d 124, 133-34) (S.D.N.Y. 1999) (Kaplan, D.J. & Peck, M.J.); *Torres* v. *Irvin*, 33 F. Supp. 2d 257, 277 (S.D.N.Y. 1998) (Cote, D.J. & Peck, M.J.).

[5] *See also, e.g.*, *DeLuca* v. *Lord*, 77 F.3d 578, 584 (2d Cir.), *cert. denied*, 519 U.S. 824, 1175. S. Ct. 83 (1996); *Dukes* v. *McGinnis*, 2000 WL 382059 at *8; *Cruz* v. *Greiner*, 1999 WL 1043961 at *16; *Lugo* v. *Kuhlmann*, 68 F. Supp. 2d at 370-71; *Santos* v. *Greiner*, 1999 WL 756473

The Supreme Court has counseled that these principles "do not establish mechanical rules." *Strickland* v. *Washington*, 466 U.S. at 696, 104 S. Ct. at 2069. The focus of the inquiry should be on the fundamental fairness of the trial and whether, despite the strong presumption of reliability, the result is unreliable because of a breakdown of the adversarial process. *Id.* The Supreme Court also made clear that "there is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.* at 697, 104 S. Ct. at 2069.[6]

In addition, the Supreme Court also has counseled that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland* v. *Washington*, 466 U.S. at 690-91, 104 S. Ct. at 2066.[7]

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at *7-8; *Franza* v. *Stinson*, 58 F. Supp. 2d at 134; *Torres* v. *Irvin*, 33 F. Supp. 2d at 277.

[6] *Accord, e.g.*, *Dukes* v. *McGinnis*, 2000 WL 382059 at *8; *Cruz* v. *Greiner*, 1999 WL 1043961 at *16; *Lugo* v. *Kuhlmann*, 68 F. Supp. 2d at 371; *Santos* v. *Greiner*, 1999 WL 756473 at *8; *Franza* v. *Stinson*, 58 F. Supp. 2d at 134; *Torres* v. *Irvin*, 33 F. Supp. 2d at 277.

[7] *Accord, e.g.*, *Dukes* v. *McGinnis*, 2000 WL 382059 at *8; *Lugo* v. *Kuhlmann*, 68 F. Supp. 2d at 371; *Santos* v. *Greiner*, 1999 WL 756473 at *8; *Franza* v. *Stinson*, 58 F. Supp. 2d at 134; *see also, e.g.*, *Engle* v. *Isaac*, 456 U.S. 107, 134, 102 S. Ct. 1558, 1575 (1982) ("We have long recognized . . . that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim."); *Jackson* v. *Leonardo*, 162 F.3d 81, 85 (2d Cir. 1998) ("In reviewing *Strickland* claims, courts are instructed to 'indulge a strong presumption

The *Strickland* test applies to appellate as well as trial counsel. *See, e.g., Mayo* v. *Henderson*, 13 F.3d at 533.[8] Appellate counsel is not required to raise every colorable claim urged by the client, but is entitled to focus on key issues while winnowing out weaker arguments. *Lugo* v. *Kuhlmann*, 68 F. Supp. 2d at 371-72.[9] Further, reviewing courts should not second guess the reasonable professional judgments of appellate counsel as to the most promising appeal issues. *Lugo* v. *Kuhlmann*, 68 F. Supp. 2d at 371-72.[10] Thus, a petitioner may establish constitutionally inadequate performance

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that counsel's conduct falls within the wide range of reasonable professional assistance' and that counsel's conduct was not the result of error but derived instead from trial strategy. We are also instructed, when reviewing decisions by counsel, not to 'second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every "colorable" claim' on appeal.") (citations omitted); *Mayo* v. *Henderson*, 13 F.3d 528, 533 (a reviewing court "may not use hindsight to second-guess [counsel's] strategy choices"), *cert. denied*, 513 U.S. 820, 115 S. Ct. 81 (1994).

[8] *See also, Dukes* v. *McGinnis*, 2000 WL 382059 at *9; *Lugo* v. *Kuhlmann*, 68 F. Supp. 2d at 371; *Franza* v. *Stinson*, 58 F. Supp. 2d at 135; *Torres* v. *Irvin*, 33 F. Supp. 2d at 277; *Hurd* v. *Keane*, 97 Civ. 2991, 1997 WL 582825 at *2 (S.D.N.Y. Sept. 19, 1997); *Ehinger* v. *Miller*, 942 F. Supp. 925, 932 (S.D.N.Y. 1996) (Mukasey, D.J. & Peck, M.J.); *Benn* v. *Stinson*, 917 F. Supp. 202, 205 (S.D.N.Y. 1995) (Stein, D.J. & Peck, M.J.).

[9] *Accord, e.g., Jones* v. *Barnes*, 463 U.S. 745, 751-53, 103 S. Ct. 3308, 3312-13 (1983); *Jackson* v. *Leonardo*, 162 F.3d at *5; *Mayo* v. *Henderson*, 13 F.3d at 533; *Dukes* v. *McGinnis*, 2000 WL 382059 at *9; *Franza* v. *Stinson*, 58 F. Supp. 2d at 135; *Torres* v. *Irvin*, 33 F. Supp. 2d at 278; *Hurd* v. *Keane*, 1997 WL 582825 at *2; *Ehinger* v. *Miller*, 942 F. Supp. at 932; *Benn* v. *Stinson*, 917 F. Supp. at 206.

[10] *Accord, e.g., Jones* v. *Barnes*, 463 U.S. at 754, 103 S. Ct. at 3314; *Tsirizotakis* v. *LeFevre*, 736 F.2d 57, 65 (2d Cir.), *cert. denied*, 469 U.S. 869, 105 S. Ct. 216 (1984); *see also, e.g., Dukes* v. *McGinnis*, 2000 WL 382059 at *9; *Franza* v. *Stinson*, 58 Supp. 2d at 135; *Torres* v. *Irvin*, 33 F. Supp. 2d at 278; *Ehinger* v. *Miller*, 942 F. Supp. at 932; *Benn* v. *Stinson*, 917 F. Supp. at 206.

only by showing that appellate counsel "omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker." *Mayo* v. *Henderson*, 13 F.3d at 533.[11]

B. Application of the *Strickland* Standard

As discussed above, the reasonable doubt jury instruction did not violate federal law. (*See* Point 1.1B above & cases cited therein.) As for state law, Fluellen has not cited, and this Court has not found, any New York cases decided prior to November-December 1989, the time of Fluellen's trial, suggesting the instruction was erroneous. Indeed, the prevailing New York decisional law at the time of Fluellen's trial indicated that the reasonable doubt charge was proper. *See, e.g.*, *People* v. *Malloy*, 55 N.Y.2d 296, 300 & n.2, 449 N.Y.S.2d 168, 169 & n.2 ("a doubt for which you can conscientiously express a reason"), *cert. denied*, 459 U.S. 847, 103 S. Ct. 104 (1982); *People* v. *Jones*, 27 N.Y.2d 222, 225-27, 316 N.Y.S.2d 617, 618-19 (1970) (reasonable doubt is one for which there is a "substantial" reason); *People* v. *Quinones*, 123 A.D.2d 793, 793, 507 N.Y.S.2d 417, 417 (2d Dep't 1986) (a reasonable doubt is a doubt for which a juror can give a reason if he is "called upon to do so in the jury room"); *People* v. *Lagroppo*, 90 A.D. 219, 231-32, 86 N.Y. 116, 126 (1st Dept 1903) (reasonable doubt is a doubt a "man of reasonable intelligence" could give a "good reason for entertaining if he is called upon to do so"), *aff'd*, 179 N.Y. 126 (1904). Therefore, viewed at the time of representation,

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[11] *See also, e.g.*, *Jackson* v. *Leonardo*, 162 F.3d at 85; *Dukes* v. *McGinnis*, 2000 WL 382059 at *9; *Lugo* v. *Kuhlman*, 68 F. Supp. 2d at 372; *Franza* v. *Stinson*, 58 F. Supp. 2d at 135; *Torres* v. *Irvin*, 33 F. Supp. 2d at 278; *Hurd* v. *Keane*, 1997 WL 582825 at *2; *Ehinger* v. *Miller*, 942 F. Supp. at 932; *Benn* v. *Stinson*, 917 F. Supp. at 206.

trial counsel's failure to object to the reasonable doubt instructions was not deficient.[12] Indeed, as noted above, even as of today the trial court's reasonable doubt charge is unwise but not erroneous.

Since Fluellen's trial counsel was not ineffective, appellate counsel cannot be faulted for choosing not to argue on appeal

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[12] Even assuming that, as Fluellen argues, *People* v. *Antommarchi*, 80 N.Y.2d 247, 251-52, 590 N.Y.S.2d 33, 35-36 (1992) (discussed in Point 1B above) suggests that the charge in Fluellen's case was erroneous, that case was decided nearly three years after Fluellen's trial, and is therefore irrelevant to an assessment of trial counsel's performance. *See, e.g.*, *Mayo* v. *Henderson*, 13 F.3d 528, 533 (2d Cir. 1994) ("In assessing the attorney's performance, a reviewing court must judge his conduct on the basis of the facts of the particular case, 'viewed at the time of counsel's conduct' . . . and may not use hindsight to second-guess his strategy choices. Counsel is not required to forecast changes in the governing law.") (citations omitted); *People* v. *Baldi*, 54 N.Y.2d 137, 147, 444 N.Y.S.2d 893, 898 (1981) ("So long as the evidence, the law, and the circumstances of the particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met."); *see also, e.g.*, *Jameson* v. *Coughlin*, 22 F.3d 427, 429 (2d Cir.) (quoting *Lilly* v. *Gilmore*, 988 F.2d 783, 786 (7th Cir.) ("The Sixth Amendment does not require counsel to forecast changes or advances in the law . . . ."), *cert. denied*, 510 U.S. 852, 114 S.Ct. 154 (1993)), *cert. denied*, 513 U.S. 888, 115 S. Ct. 232 (1994); *Siefert* v. *Keane*, 74 F. Supp. 2d 199, 207 (E.D.N.Y. 1999) ("an attorney's performance must be evaluated in light of the prevailing legal practice at the time, without the benefit of hindsight"), *aff'd mem.*, 205 F.3d 1324 (2d Cir. 2000); *Dixon* v. *Miller*, 56 F. Supp. 2d 289, 299 E.D.N.Y. 1999); *Mingo* v. *Artuz*, 95 Civ. 1087, 1999 WL 301686 at *3 (E.D.N.Y. May 5, 1999); *Marino* v. *United States*, 97 Civ. 2107, 95 Cr. 116, 1998 WL 214877 at *5 (S.D.N.Y. April 28, 1998) ("A defendant is entitled to a competent lawyer, not an omniscient one."); *Marino* v. *United States*, 97 Civ. 1884, 89 Cr. 341, 1997 WL 714879 at *3 (S.D.N.Y. Nov. 17, 1997) ("Counsel's failure to predict a change in the law does not constitute a performance falling below objectively reasonable professional standards."); *People* v. *Flores*, 84 N.Y.2d 184, 188, 615 N.Y.S.2d 662, 664 (1994); *People* v. *Lane*, 93 A.D.2d 92, 97, 460 N.Y.S.2d 926, 931 (1st Dept 1983).

the ineffective assistance of trial counsel. *See, e.g., Dukes* v. *McGinnis*, 99 Civ. 9731, 2000 WL 382059 at *12 (S.D.N.Y. April 17, 2000) (Peck, M.J.)[13]

CONCLUSION

For the reasons set forth above, the Court should deny Fluellen's petition. However, because the trial court's reasonable doubt charge is close to the line under Second Circuit precedent, the Court should grant Fluellen a certificate of appealability limited to that claim. *See Slack* v. *McDaniel*, 120 S. Ct. 1595, 1599 (2000) (certificate of appealability should issue where "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further"); *Lucidore* v. *New York State Div. of Parole*, 209 F.3d 107, 112 (2d Cir. 2000) (certificate of appealability should issue "if the issues involved in a petition are debatable among jurists of reason, could be resolved in a different manner, or are adequate to deserve encouragement to proceed further").

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Such objections (and any responses to objections) shall be filed with the Clerk of the

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[13] *See also, e.g., Marel* v. *Lord*, 95 Civ. 9968, 1998 WL 17730 at *4 (S.D.N.Y. Jan. 16, 1998), *aff'd*, 173 F.3d 845 (2d Cir. 1999); *Ehinger* v. *Miller*, 942 F. Supp. 925, 928, 934 (S.D.N.Y. 1996) (Mukasey, D.J. & Peck, M.J.); *Bradford* v. *Keane*, CIV. A. No. CV-94-4665, 1996 WL 361593 at *20 (E.D.N.Y. June 3, 1996); *Adams* v. *People of the State of New York*, No. 95-CV-687, 1996 WL 345793 at *4 (E.D.N.Y. June 4, 1996); *Todd* v. *Berry*, 86 Civ. 9875, 1988 WL 103351 at *6 (S.D.N.Y. Sept. 27, 1988).

Court, with courtesy copies delivered to the chambers of the Honorable Kimba M. Wood, 500 Pearl Street, Room 1610, and to my chambers, 500 Pearl Street, Room 1370. Any requests for an extension of time for filing objections must be directed to Judge Wood. Failure to file objections will result in a waiver of those objections for purposes of appeal. *Thomas* v. *Arn*, 474 U.S. 140, 106 S. Ct. 466 (1985); *IUE AFL-CIO Pension Fund* v. *Herrmann*, 9 F.3d 1049, 1054 (2d Cir. 1993), *cert. denied*, 513 U.S. 822, 115 S. Ct. 86 (1994); *Roldan* v. *Racette*, 984 F.2d 85, 89 (2d Cir. 1993); *Frank* v. *Johnson*, 968 F.2d 298, 300 (2d Cir.), *cert. denied*, 506 U.S. 1038, 113 S. Ct. 825 (1992); *Small* v. *Secretary of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989); *Wesolek* v. *Canadair, Ltd.*, 838 F.2d 55, 57-59 (2d Cir. 1988); *McCarthy* v. *Manson*, 714 F.2d, 234, 237-38 (2d Cir. 1983); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e).

Dated: New York, New York
May 25, 2000

Respectfully submitted,

/s/ Andrew J. Peck
Andrew J. Peck
United States Magistrate Judge

Copies to:
George Fluellen
Donald Siewert, Esq.
Judge Kimba M. Wood